

## REMARKS/ARGUMENTS

### Amendments

Independent claims 11 and 21 have been amended to make it clear that the defined packaging atmosphere is an equilibrium atmosphere in which the oxygen and carbon dioxide contents have substantially constant values within the stated ranges. As noted on page 6 of the previous Reply, the previous wording was intended to

*make it clear that the defined packaging atmosphere is substantially constant, i.e. is an equilibrium atmosphere.*

Applicant believes that the previous wording did indeed make it clear that the atmosphere within the claimed package was an equilibrium atmosphere. Nevertheless, for the avoidance of doubt and in the interest of speedy prosecution, the claims have been amended to make it explicitly clear that the atmosphere is an equilibrium atmosphere in which the oxygen and carbon dioxide contents have equilibrium values within the ranges stated.

Claims 11 and 21 have also been amended to change the maximum total quantity of oxygen and carbon dioxide from 17% to 20%, for consistency with the upper limit of 19% for the oxygen content. Basis for this amendment is on page 15, lines 8-9, of the specification as filed.

### The Rejections under 35 USC 112

Applicant respectfully traverses the rejection of claims 11-15 and 21-25 under 35 USC 112, insofar as the rejection is applicable to the amended claims. As noted above, the independent claims have been amended, in view of the Examiner's comments, to refer explicitly to the fact that the packaging atmosphere is an equilibrium atmosphere in which the oxygen and carbon dioxide contents have substantially constant values within the stated ranges. Since the bananas are within a sealed container, this means that the rate at which the bananas consume oxygen from the packaging atmosphere is the

same as the rate at which oxygen enters the packaging atmosphere through the sealed container, and that the rate at which the bananas produce carbon dioxide is the same as the rate at which carbon dioxide leaves the packaging atmosphere through the sealed container.

The Rejection under 35 U.S.C. 103

Applicants respectfully traverse the rejection of claims 11-15 under 35 U.S.C. 103 as unpatentable over

(1) either EP 752378 (hereinafter "Scolaro") in view of U.S. Patent No. 3,798,333 (hereinafter "Cummin"), or vice versa, both further in view of U.S. Patent No. 3,450,544 (hereinafter "Badran 544"), U.S. Patent No. 3,450,542 (hereinafter "Badran 542"), U.S. Patent No. 4,842,875 (hereinafter "Anderson"), U.S. Patent No. 5,045,331 (hereinafter "Antoon 331") and further in view, U.S. Patent No. 6,013,293 (hereinafter "De Moor"), further in view of newly added J. of Experimental Botany, Tropical Agriculture, Refrigeration (1973), Foods and Food Ingredients (Japan 1998), Intl. Conference of CA Packaging (1984), Annals of Botany (1947), and Proc. Atm. Res. Conf (1989), Intl. J. of Food Science and Technology (1988), and HortScience (1971), or

(2) over the same references, but using Anderson as the primary reference, insofar as those rejections are applicable to the amended claims, and in so far as those rejections can be understood.

Applicant has not been able to identify with certainty the "newly added" references. If the Examiner continues to rely upon any of these "newly added" references, he is asked to provide full identification of each such reference, for example by providing the details set out of the corresponding PTO 1449.

For the avoidance of doubt, if the Examiner maintains any rejection of claims under 35 USC 103, he is asked to set out in full each combination of references which is relied upon.

## General

initially, it is noted that the patentability of each claim depends upon the scope of the claim read as a whole, taking into account, for example, not only the defined packaging atmosphere, but also the temperature, the stated oxygen permeability, the stated R ratio and the stated ethylene permeability.

It is well-settled law that the burden of establishing a *prima facie* case under 35 USC 103 is on the Examiner. The previous Reply sets out, on pages 8-17, a detailed account of the differences between the claims and the primary references (Scolaro, Cummin and Anderson) as well as the secondary references previously relied upon (Badran 542, Badran 544, Antoon 331 and DeMoor), and Applicant incorporates that detailed account by reference in this Reply.

As stated on page 17 of the previous Reply, the primary references and the secondary references previously relied upon,

*... consistently recommend an oxygen content far below the 14-19% range of claim 11 (2-5% in Anderson and Antoon 331; less than 7% in Badran 542; 1.4-10% in Badran 544; and 2-6% in Scolaro); and/or are not concerned with bananas (DeMoor); and/or make use of containers whose oxygen permeability is far below that required by claim 11 (Anderson, Antoon 331 and Scolaro).*

The Examiner has not questioned the accuracy of that statement. There is no basis, therefore, for the Examiner's assertion that the references "fairly suggest the recited range" (presumably the Examiner is referring to the range of oxygen content).

The Examiner has asserted that

*... the art taken as a whole would fairly (presumably some word such as lead or encourage was omitted) one of ordinary skill in the art to carry out routine and obvious experimentation (and now analog modeling) to achieve optimum results.*

Since the Examiner has stated that the remarks in the previous Reply have been considered and are not persuasive; and since the accuracy of the remarks in the previous reply has not been questioned; it appears that the Examiner is rejecting the claims on the basis that no claim in this area of technology can be patentable, because "routine and obvious experimentation" will result in the discovery of every requirement as to the structural characteristics of the container, the contents of the container, and the packaging atmosphere within the container. In the present case, the references not only fail to provide a basis for the selection of required features of the claim, but also contain recommendations which lead away from required features of the claim. Under such circumstances, Applicant submits that the claim cannot be rejected on the basis of the Examiner's opinion as to what constitutes "routine and obvious experimentation".

### **The Experimental Results**

If, contrary to Applicant's submission, the Examiner maintains that a prima facie case has been made, Applicant will rely upon the experimental evidence in the specification to show that the claimed range of 14-19 % of oxygen achieves unexpected and valuable results relative to the prior art, thus rebutting the prima facie case and establishing the patentability of the invention (MPEP 2144.05 III). In this respect,, Applicant refers the Examiner to, and incorporates by reference in this Reply, the discussion of experimental results on page 20 of the previous Reply.

With regard to the Examiner's comments, the permeabilities of the bags are provided on page 17, line 20, to page 18, line 23.

### **Continuation Application(s)**

As in the previous Reply, Applicant notes for the record that it is his intention to file one or more continuing applications to claim the aspects of the invention disclosed in this application and not specifically claimed in the present claims. In this connection, attention is directed to the eleven aspects of the invention disclosed in the Summary of

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Invention on pages 4-9 of the application, and the associated disclosure in the Detailed Description of the Invention, including the specific Examples, on pages 10-32 of the application

**Request to Return Signed Information Disclosure Statements**

Applicant is pleased to know that the Office electronic file contains initialed copies of the PTO 1449s filed with Information Disclosure Statements on 4/26/2002, 5/17/2002, 1/8/2003, and 5/13/2003. Applicant has no record of receiving those initialed PTO 1449s. In order to complete Applicant's file, the Examiner is asked to send copies of the initialed PTO 1449s.

**CONCLUSION**

It is believed that this application is now in condition for allowance, and Applicant respectfully requests that a timely Notice of Allowance be issued in this case. If, however, there are any outstanding issues that could usefully be discussed by telephone, the Examiner is asked to call the undersigned.

Respectfully submitted



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